

## **Informal Comments of Professor Alan Morrison on the FACA Project**

My main suggestion relates to selection of committee members and assuring balance. My idea is to require that the agency include in its charter *its* understanding of the mission of the committee and how it understands that the issue of balance should be addressed in terms of the mission. Your paper gives examples where balance would make no sense (geography where there is no issue of geography or race where the issue is a technical one relating to nuclear reactors), but the point seems clear. The charter would also indicate whether expertise from representatives of particular interests was necessary, which would help with your two group concept. GSA would examine the charter to see that the agency included these criteria and that they seemed clear and sensible for this mission. Then the agency would decide whether to seek outside input or not, but it would have guidelines in picking the committee members. And if the charter said that farmers or consumers needed to be represented in a committee about food safety, and there were no such representatives, either a court on judicial review (if that is available and that is not a battle I want to fight here) or the public when the report comes out, can point to this obvious disparity and ask the agency or Congress to draw appropriate conclusions about bias, etc. In addition, it would be useful that those members chosen to fill specific slots were so designated in a public document. This relates to Rec 3 and the discussion on page 59.

Second, on the issue of waivers, telling the public that there has been a waiver, without telling the public the general issue of what the waiver is, tells the public nothing. Does the person work for a company with an interest in the matter; did the person do work for the company as a consultant, in another area, some time ago? Does the person's spouse own \$100 or \$100,000 in stock of a relevant company? No exact dollar amounts need be included, but ranges, like on federal disclosure forms, are adequate (and perhaps even less). But there has to be something, and all committee member bios should be posted on the committee website.

Third, I am not sure how I feel about on line forums, in which the "discussion" continues over several days. It reminds me of our discussions about the Sunshine Act where there are meetings between fewer than a quorum to avoid openness requirements, but the result is that there is no collegial discussion. Is there a problem with committee members dropping in & out and missing parts of the conversation? The only specific point I would make is to delete the words "as appropriate" at the end of Rec 2 - after "should consider" this seems quite redundant.

Fourth, similar to the last part of the prior suggestion, I would delete "to the extent possible" in Rec 4 to Congress about what it should do. Let's tell Congress what it should do and not water it down further. It will do what it wants to anyway, and we should be on record as saying what the statute should contain.

Fifth, Rec 8 dealing with live webcasts suggests a balancing test. I suggest that it be made clear that the test should be applied on a committee by committee basis, and perhaps on a meeting by meeting basis, because all committees and all meetings are not created equal.

Sixth, on page 60, the discussion about numbers and percentages troubles me for two reasons. First, the most important aspect of balance is not numbers, but having one person who can speak up for a point of view. Time and again a lone voice can assure that issues are raised and that

solutions are found that do a much better job of taking some interest into account than if no one is there to represent that viewpoint. Most committees end up proceeding by consensus, not votes, and so actual numerical balance is not vital. Second, if there is one viewpoint on an issue that is very much in the minority, it does not do any harm to the committee to have that viewpoint represented, and it eliminates the ability of others to criticize the committee on that ground. Suppose there was climate change committee: how much harm would it do to have one responsible (whatever that means in some situations, but at least it includes people with appropriate credentials) person who is a denier or extreme skeptic? The chair can control proceedings. So just take out those numbers.

Seventh, on page 60 you raise the issue of having names publicly designated as committee members so that the public can express their views as being somehow unfair to the nominees. That happens all the time with Senate confirmees and it is just a fact of life. More to the point, the NAS uses such a process for its committees and it has not been a serious problem. I think an agency can list the names of enough people to fill the panel and expect that, absent special circumstances, the panel will survive as is. And if not, the problem is more likely to be not enough of something, rather than one person who should not serve for some reason. That is a consequence of my view that numbers alone are less important than having an articulate spokesman for particular viewpoints.

Last, I think that the idea underlying the two types of members has some appeal, but it seems unclear and/or strained as written. I think it needs more work and perhaps some draft language for FACA would be useful, not because it would be enacted, but to sharpen our thinking and so that the conference as a whole would understand this better.

Hope this is helpful, Alan